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Supreme Court of the United States

OCTOBER TERM, 1965.

No. 231

DUN & BRADSTREET, INC.,

Petitioner,

against

G. C. NICKLAUS, Trustee in Bankruptcy for FORDYCE WOOD PRODUCTS, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

TO THE HONORABLE EARL WARREN, CHIEF JUSTICE OF THE UNITED STATES AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Dun & Bradstreet, Inc., prays that a writ of certiorari issue to the United States Court of Appeals for the Eighth Circuit for review of the decision of that court entered on February 3, 1965.

Opinions Below.

The opinion in the Court of Appeals for the Eighth Circuit affirming the judgment of the United States District Court for the Eastern District of Arkansas is reported at

340 F. 2d 882 and may be found at page 3a of the appendix to this brief.[1] The judgment of that court may be found at page 11a. The opinion of the Honorable J. Smith Henley, United States District Judge may be found at page 13a.

Jurisdiction.

The judgment of the Court of Appeals for the Eighth Circuit sought to be reviewed was entered on February 3, 1965. A timely petition for rehearing was filed on February 22, 1965, and was denied on March 16, 1965.

The oral argument in the Court of Appeals was held on March 9, 1964. On that same day, this Court decided *New York Times Co.* v. *Sullivan*, 376 U. S. 254. Discussion in briefs and oral argument with respect to *New York Times Co.* was necessarily precluded. The constitutional considerations suggested initially[2] by *New York Times Co.* were argued in the petition for a rehearing which was denied by the Court of Appeals[3] (page 21 of Proceedings in Court of Appeals, Vol. II of R)

The statutory provision conferring jurisdiction on this Court is contained in 28 U. S. C. A. §1254(1).

Questions Presented.

1. Does the determination made by the Court of Appeals deny petitioner's protection under Amendments I

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[1] Numbers in parentheses are references to the appendix to this brief; or to the record, R , unless otherwise indicated.

[2] See references in footnote 7.

[3] This Court has not hesitated to consider issues not raised at the trial level when rulings by it have been delivered in the interim affecting applicable rules of law. *Dewey* v. *Des Moines*, 173 U. S. 193, 199 (1898); *McGoldrick* v. *Compagnie Generale Transatlantique*, 309 U. S. 430, 434 (1940); *United Brotherhood of Carpenters and Joiners of America* v. *United States*, 330 U. S. 395 (1946); *Hormel* v. *Helvering*, 312 U. S. 552, 557, 558, 559 (1941). This is particularly true with respect to constitutional questions. *Griffin* v. *California*, 85 S. Ct. 1229 (April 28, 1965).

and XIV of the Constitution of the United States in failing to comply with interpretations and applications of those amendments made by this Court in *New York Times Co.* v. *Sullivan,* 376 U. S. 254 (March 9, 1964); *Garreston* v. *Louisiana,* 379 U. S. 64 (November 23, 1964), by applying a definition of the defense of truth contrary to the rulings of this Court?

2. Does the determination made by the Court of Appeals deny petitioner's protection under Amendments I and XIV of the Constitution of the United States in failing to adhere to interpretations and applications of those amendments made by this Court in *New York Times Co.* v. *Sullivan,* 376 U. S. 254 (March 9, 1964), by applying a definition of malice contrary to the ruling of this Court in that case?

Statutes Involved.

The First and Fourteenth Amendments of the Constitution of the United States are set forth at 1a.

Statement of the Case.

This diversity action in libel was tried before the United States District Court for the Eastern District of Arkansas resulting in a verdict against petitioner for $40,000 actual damages and $10,000 punitive damages (R 1, 542).

Petitioner is a mercantile agency which gathers, evaluates and furnishes to its subscribers confidential credit information upon their inquiry therefor. Respondent is a trustee in bankruptcy of plaintiff Fordyce Wood Products, Inc. (Fordyce) which was engaged in the business of manu-

facturing various wood products in Fordyce, Arkansas. In early 1963, it was adjudged a bankrupt and respondent Nicklaus was substituted as plaintiff. (R 547)

A notice of tax lien (26 U. S. C. A. §6321) was filed on November 28, 1960, on behalf of the United States against plaintiff in the office of the Circuit Clerk and Recorder of Dallas County, Arkansas, for delinquent taxes withheld by plaintiff for wages paid to its employees for the second quarter of 1960, and penalty for late payment for the first quarter. (R 8, 9)

On November 29, 1960, Mrs. Morgan, a "record item correspondent" for petitioner in Dallas County, examined the lien records and completed a printed form to report the filing of the lien. Mrs. Morgan had become a correspondent for petitioner in 1956. She was in the Circuit Clerk's office on November 29, 1960. Mrs. Morgan heard Mrs. Thornton, the Deputy Clerk, say that a Mr. Bradley, who had filed the notice of tax lien on behalf of the Internal Revenue Service, had said that he was going to the bank and file it. Accordingly, Mrs. Morgan added to the printed form reporting the filing of the lien the notation "Also lien filed on Bank Account by U. S. A." The following report was prepared and furnished to 51 of petitioner's subscribers who had previously requested information regarding Fordyce:

"PLAINTIFF'S EXHIBIT 30 (R 24)

SPECIAL
NOTICE
DUN & BRADSTREET REPORT
SN 85 DECEMBER 6, 1960
MGF MOLDINGS

FORDYCE WOOD PRODUCTS, INC. 1946—
401 So RUSSELL
FORDYCE ARK
DALLAS COUNTY

FOLLOWING INFORMATION TAKEN FROM LIEN RECORDS —

Suit styled U.S.A., vs. Fordyce Wood Products, Inc., filed Nov. 28, 1960, cause of action, withhold tax for 1st and 2nd quarter of 1960. Lien filed; also, lien filed on bank account of subject by U.S.A. 12-6-60 (PR 51)"

The portion of the printed form utilized by Mrs. Morgan was captioned "Suits or Judgments" (R 97), and while there was no testimony from the person who actually prepared Plaintiff's Exhibit 30 the obvious and sole explanation for use of the words "suit filed" is the printed caption on the report submitted by Mrs. Morgan (See R 107).

Initial distribution of this report was made on December 6, 1960.

On March 6, 1961, the president of Fordyce became aware this report had been published by petitioner. A second report dated March 6, 1961 was thereupon published.[4]

[4] Three of petitioner's subscribers to whom the first report had been sent were not sent the second report by reason of the fact that their subscription agreement had expired.

This report of March 6, 1961, read as follows:

"PLAINTIFF'S EXHIBIT 33 (R 24)

SPECIAL
NOTICE

DUN & BRADSTREET REPORT
SN 85 MAR 6 1961 N
MFG MOLDINGS

FORDYCE WOOD PRODUCTS, INC. 1946—
401 So. RUSSELL
FORDYCE ARK DALLAS COUNTY

Further investigation reveals tax lien filed by U. S. A. vs. Fordyce Wood Products, Inc., on Nov. 28, 1960, was satisfied and released of record, Dec. 1, 1960. It is further understood that lien on bank account has also been satisfied 3-6-61. (066c-9)."

After suit had been commenced by Fordyce on December 5, 1961 (R 1-6), petitioner made answer thereto and set up as defenses substantial *truth* and *qualified privilege* (R 13-16).

As noted above, the jury returned a verdict against petitioner for $40,000 actual damages and $10,000 punitive damages (R 542).

On the defense of *substantial truth,* the court instructed the jury as follows:

> "Taking up first the element of falsity, although the defendant contends that the statements or reports in question were substantially true, the Court now tells you as a matter of law that the statements were in fact false, and that you may consider that the first element of plaintiff's claim has been established as a matter of law." (R 535)

to which objection was made by petitioner as follows:

> "The defendant objects to the Court's instruction to the jury that the publications in question are false

as a matter of law, for the reason that the testimony would support a finding of fact by the jury that these reports were substantially true, and that the part of the reports that were literally true was the sting of the reports, and the defendant, therefore, requests that the Court submit that issue to the jury for a finding of fact.

"The Court: All right, that request will be denied." (R 530)

With respect to *qualified privilage, and malice* the trial court instructed the jury as follows:

"As to defendant's claim of conditional privilege, you are told that a financial reporting company, such as Dun & Bradstreet, is not an insurer of the accuracy of the financial reports which it disseminates to its subscribers. Such reports are said to be 'conditionally privileged,' and as long as such reports are published in good faith and without malice and as long as the privilege is not abused, the reporting agency is not liable to the subject or subjects of the reports on account of misinformation appearing therein.

"Now, this rule of conditional privilege is a legal protection based upon a public policy which recognizes that it is essential that true financial and credit information, with respect to individuals and corporations engaged in business or seeking credit shall be readily available to those having a legitimate interest in securing such information. In order that such information shall be given freely, it is necessary to afford protection to reporting agencies against liability for misinformation given in an honest and reasonable effort to provide the information sought. It is the position of the defendant that even if the statements in question were false, defamatory and damaging, still they were circulated in good faith and without malice, and that there is no liability on defendant's part.

"The Court now tells you that the dissemination of the two reports in question were occasions of conditional privilege. Therefore, even though you may find from a preponderance of the evidence that the reports, or either of them, were false, defamatory, and damaging, nevertheless your verdict must be for the defendant unless you further find from a preponderance of the evidence that the reports were disseminated with malice or that the defendant abused its conditional privilege by excessive publication of the reports. The burden of proving the existence of malice or the excessive circulation of the reports by a preponderance of the evidence is on the plaintiff.

"Now 'malice,' as I have used this term, means the doing of a wrongful act, either in a personal sense, as the doing of an act intentionally that is wrong, or the doing of an act actuated by spite, grudge, hatred, ill will or evil intent, or, in the impersonal sense such as the doing of an act without just cause or excuse, with such a conscious indifference or reckless disregard as to its results or effects upon the rights of others as to constitute ill will.

"I might say, Members of the Jury, that the plaintiff does not contend in this case that the defendant acted with malice in the personal sense just outlined, that is with any spite, grudge or hatred, but it does contend that the defendant acted with malice in the impersonal sense, that is to say that the publications of the statements as published were without just cause or excuse, and were characterized by such a conscious indifference or reckless disregard as to their results or effects upon the rights of plaintiff as to constitute ill will." (R 536, 537)

With respect to the charge relating to *malice,* petitioner made appropriate objection. (R 532, 543, 544)

Reasons for Granting the Writ.

1. To determine whether Amendments I and XIV have application to actions in libel involving false defamatory statements concerning private citizens under circumstances of privilege as distinguished from public officials with respect to their official conduct as ruled in *New York Times Co.*

2. To determine whether constitutional principles apply in determining whether a qualified privilege in a libel action not involving a public official and his public acts is destroyed only by malice as defined in *New York Times Co.*

3. To determine whether substantial truth in an action for libel involving a non-public official is a matter of defense or whether plaintiff must carry the burden of proof to establish the falsity of the alleged defamatory matter and to consider the constitutional adequacy of proof with respect thereto.

4. To determine whether the casting of the burden of proof on a defendant to establish the truth of an alleged defamatory statement constitute a denial of constitutional protections under Amendments I and XIV.

5. The problems involved are of great and important public interest which should be remedied by this Court.

Argument for Granting the Writ.

Petitioner urges that the failure of the trial court and of the Court of Appeals to comply with its request that its defense of *substantial truth* be submitted to the jury was a violation of the petitioner's rights to protection

under the First and Fourteenth Amendments. This Court in *New York Times* in referring to a publication containing some true and some false statements stated (page 289):

> "The ruling is that these discrepancies between what was true and what was asserted were sufficient to injure respondent's reputation may itself raise constitutional problems, but we need not consider them here."

In the case at bar, the trial court ruled that the report sued upon was false as a matter of law and refused to submit the question of substantial truth of the alleged defamatory matter to the jury. Of course, the substantial truth of the publication complained of would have been a complete defense to this action in libel.

It is stated in Prosser, *Law of Torts*, 2d Ed. 632 (1955):

> "* * * it is now generally agreed that it is not necessary to prove the literal truth of the accusation in every detail and that it is sufficient to show that the imputation is substantially true, or, as it is often put to justify the 'gist' or 'sting' of the defamation."

The trial court's charge (R 532-542) does not purport to submit any question for the jury's determination as to what was the "sting" or "gist" of the reports. Petitioner sought to have the question submitted to the jury. (R 530) The request was denied. (R 530) The Court of Appeals, though urged, overlooked the failure of the trial court to submit to the jury in any form the question of what the "sting" or "gist" of a publication was. The effect of the trial court's charge was to hold, as a matter of law, that the "sting" or "gist" of the reports was false. Mr. Justice Brennan in *New York Times Co.* (page 271) stated:

> "Authoritative interpretations on the First Amendment guarantees have consistently refused to

> recognize an exception for any test of truth, whether administered by judges, juries, or administrative officials—and especially not one that puts the burden of proving truth on the speaker. Cf. *Speiser* v. *Randall*, 357 U. S. 513, 525-526. The constitutional protection does not turn upon 'the truth, popularity, or social utility of the ideas and beliefs which are offered.' *N. A. A. C. P.* v. *Button*, 371 U. S. 415, 445."

For the trial court to have required petitioner to prove the literal truth of all published words, destroyed petitioner's protected constitutional right to publish substantial truth. The authorities have consistently held that no liability exists if the assailed publication is substantially true, i.e., if the "gist" or "sting" of the alleged libel is true. *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (March 9, 1964); *Fleckenstein* v. *Friedman*, 266 N. Y. 19, 23 (1934); *Hearne* v. *De Young*, 119 Cal. 670, 52 Pac. 150 (1898); *Wilson* v. *United Press Association*, 343 Ill. App. 238, 243, 98 N. E. 2d 391, 393 (1951); Restatement, *Torts* §582 (1938).

Whenever a publisher is deprived of traditional defenses in a libel action, the First Amendment is violated, *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 269; *Garretson* v. *Louisiana*, 379 U. S. 64 (November 23, 1964).

Petitioner further urges that a writ of certiorari should be granted for the reason that the Court of Appeals erroneously applied constitutional principles to the facts relating to *malice* contrary to the ruling of this Court in *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 269, 287. The Court of Appeals in the case at bar emphasized at 340 F. 2d 886 (1965) (9a):

> "We think that there was sufficient evidence of 'conscious indifference' for the district court to properly

> submit this issue [malice] and the matter of punitive damages to the jury. The most significant evidence reveals that there was no review by anyone having authority in appellant's organization."

The reference is to a review of the report compiled and distributed by petitioner to its subscribers upon their request therefor. It is stated that the failure of someone having authority in petitioner's organization to review or check what Mrs. Morgan had reported, prior to its publication by petitioner, constituted evidence of malice. Mrs. Morgan had experience as correspondent of petitioner for some four or five years prior to her having furnished the information published by petitioner. The ruling by the Court of Appeals is directly contrary to the conclusion reached by this Court in *New York Times Co.* (page 287).

Petitioner urges that its constitutional rights under the First and Fourteenth Amendments of the Constitution guaranteeing the freedom of speech and of the press have been violated and seeks protection from this Court.

Mr. Justice Brennan in *New York Times Co.* stated at page 285:

> "This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. This is such a case, particularly since the question is one of alleged trespass across 'the line between speech unconditionally guaranteed and speech which may legitimately be regulated.' *Speiser* v. *Randall*, 357 U. S. 513, 525. In cases where that line must be drawn, the rule is that we 'examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect.' *Pennekamp* v.

Florida, 328 U. S. 331, 335; see also *One, Inc.* v. *Olesen*, 355 U. S. 371; *Sunshine Book Co.* v. *Summerfield*, 355 U. S. 372. We must 'make an independent examination of the whole record,' *Edwards* v. *South Carolina*, 372 U. S. 229, 235, so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression.

"Applying these standards, we consider that the proof presented to show actual malice lacks the convincing clarity which the constitutional standard demands, and hence that it would not constitutionally sustain the judgment for respondent under the proper rule of law. * * *, there was no evidence whatever that they [defendants] were aware of any erroneous statements or were in any way reckless in that regard. The judgment against them is thus without constitutional support."[5]

At page 287, Mr. Justice Brennan noted:

"Finally, there is evidence that the Times published the advertisement without checking its accuracy against the news stories in the Times' own files. The mere presence of the stories in the files does not, of course, establish that the Times 'knew' the advertisement was false, since the state of mind required for actual malice would have to be brought home to the persons in the Times' organization having responsibility for the publication of the advertisement. * * * We think the evidence against the Times supports at most a finding of negligence in failing to discover the misstatements, and is con-

[5] A scholar has noted:

"The Court makes actual malice a 'constitutional fact' that it will review de novo and indeed did review de novo in the case itself. There is thus some protection afforded against a too facile or disingenuous finding of the existence of malice." See "The New York Times Case: A Note on 'The Central Meaning of the First Amendment'", by Professor Harry Kalven, Jr., 1964 The Supreme Court Review, at page 220.

stitutionally insufficient to show the recklessness that is required for a finding of actual malice." [citations omitted]

The trial court in its charge to the jury referred to excessive publication by petitioner of the reports claimed to be defamatory as follows:

> "As to the claim of plaintiff that the defendant was guilty of excessive publication of the reports, you are told that in order to avail itself of its qualified or conditional privilege in connection with the dissemination of financial information to its subscribers, a reporting agency such as the defendant is required to confine the circulation to subscribers who have a legitimate interest in the financial status or affairs of the subject of the reports." (R 538)[6]

The Court of Appeals pointed out that the jury returned a general verdict and there was no way to know whether the jury found excessive publication or not. It stated that (10a):

> "Certainly the jury did find malice (awarded punitive damages) and, as discussed earlier, there was

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[6] The evidence in this case established that the reports were distributed to petitioner's subscribers who had made inquiry with respect to plaintiff Fordyce except, possibly, one of petitioner's subscribers, Mr. Harry Russell, who had business dealings with plaintiff Fordyce (R 57, 58, 59), and who testified (R 59):

> "Q. All right, now, in connection with this proposal on or about that time or afterwards did you receive a report from Dun & Bradstreet with reference to Fordyce Wood Products? A. Yes, but it was not a requested report, because we already had that in our files.
>
> Q. What do you mean? A. One of the regular, normal procedures that we would use, we had that in our file."

This subscriber's interest in the financial condition of plaintiff Fordyce is sufficient to establish the privilege of defendant, as noted by the trial judge, in furnishing him with the information relating to plaintiff Fordyce. In any event, furnishing of the report to this subscriber would not have destroyed the privilege with respect to other subscribers who had made inquiry of petitioner for information respecting plaintiff Fordyce.

substantial evidence of malice. Due to these facts we are of the opinion that the matter of whether or not there was sufficient evidence of excessive publication is immaterial, moot, and certainly not prejudicial."

The report was furnished, according to the uncontradicted evidence in the record of this case, to those subscribers of petitioner who had made inquiry therefor under their subscription agreement, except as noted above.

Certainly it was error for the trial court and for the Court of Appeals to disregard the errors made with respect to any finding of malice based upon excessive publication. This again constituted a violation of petitioner's constitutional rights (page 285 of *New York Times Co.*).

Conclusion.

For the foregoing reasons demonstrating that petitioner has been denied constitutional protection under Amendments I and XIV; and in view of the fact that the questions presented are novel and important,[7] the petition for a writ of certiorari should be granted.

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[7] For example, in "The New York Times Case: A Note on 'The Central Meaning of the First Amendment'", by Professor Harry Kalven, Jr., 1964 The Supreme Court Review, it is stated at page 191:

> "Since the case involved a rare instance of measuring the common law of defamation by constitutional standards, it clamors for a careful determination of how much of that traditional body of tort law is affected by it. And for the torts teacher, it has the dizzying consequence of transmuting a part of his domain—one that he traditionally does not reach until the last day of the semester—into constitutional law, the Valhalla of the law school curriculum."

In "Libel and the First Amendment—a New Constitutional Privilege" by Professor Arthur L. Berney, Virginia Law Review (Volume 51, No. 1, January 1965), it is stated at page 1:

Dated: June 8, 1965.

Respectfully submitted,

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"However, our High Court was having none of the law's 'disjointed incrementalism' when it for the first time found libelous utterance protected under the first amendment."

In "New York Times Co. *v.* Sullivan—The Scope of a Privilege", a Note in the Virginia Law Review for January, 1965 (Volume 51, No. 1), it is stated at page 106:

"Applying the first amendment to the law of libel for the first time, the Supreme Court in *New York Times Co.* v. *Sullivan* held that the constitutional guarantees of freedom of speech and of the press limit a state's power to award damages in a libel action brought by a public official against critics of his official conduct."

Mr. Justice Goldberg in his concurring opinion in *New York Times Co.* v. *Sullivan*, stated at page 299:

"We must recognize that we are writing upon a clean slate." [And see footnote 3 to his opinion.]